Supreme Court, U.S.
FILED

941301 JAN 30 1995

Case No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

1994 TERM

DENNIS HOOD,
Petitioner,

vs.

JULIE HERALD,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

THEODORE CHUPARKOFF

Ohio Supreme Court Registration No. 0030832

Counsel of Record for the Petitioner

The Evans Building, Suite 501

333 South Main Street

Akron, Ohio 44308

1-216-376-2156

The Victor Printing & Publishing Co., Akron, Ohio — (216) 945-4090

QUESTION PRESENTED FOR REVIEW

The plaintiff-respondent in an intentional tort action alleged that from 1962 through 1974, she was sexually abused by the defendant-petitioner. Respondent claimed she repressed the memories of the alleged abuse until January, 1989. A jury found in favor of the respondent. The petitioner steadfastly denies the allegations.

The question presented for review is whether the adjudication of such a claim without corroborating evidence violates a defendant's right to due process pursuant to the Fourteenth Amendment of the United States Constitution.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdictional Grounds	1
The Constitutional Provision Involved	1
Statement of the Case	2
Argument	3
Conclusion	5
Signature of Petitioner's Counsel of Record	5

APPENDIX

Petitioner's Motion to Dismiss Evidentiary Hearing Requested	6
Petitioner's Supplemental Brief in Support of Motion to Dismiss	8
Trial Court's Finding and Order	14
Journal Entry of the Court of Appeals	16
Opinion of the Court of Appeals	17
Petitioner's Propositions of Law before the Supreme Court of Ohio	32
Petitioner's Assignments of Error before the Ninth District Court of Appeals, Summit County, Ohio	32
Judgment Entry of the Supreme Court of Ohio	33
Reconsideration Entry of the Supreme Court of Ohio	34

TABLE OF AUTHORITIES

CASES

	Page
Boddie v. Connecticut, 401 U.S. 371 91 S.C.T 780, 28 LEd.2d 113 (1971)	3
Hovey v. Elliott, 167 U.S. 409 (1897)	3

The petitioner, Dennis Hood, respectfully petitions for a writ of certiorari.

OPINIONS BELOW

The court of appeals for the Ninth District of Ohio delivered the only opinion in this case. The opinion is unreported and is reproduced verbatim in the appendix of this petition for a Writ of Certiorari.

JURISDICTION

The date of entry of the judgment of the Court of Appeals for the Ninth District of Ohio is July 21, 1993. The Supreme Court of Ohio accepted discretionary review of the case on December 15, 1993. The Supreme Court of Ohio, however, dismissed the case as being improvidently allowed on September 28, 1994, and denied a motion for reconsideration on November 2, 1994.

The statutory provision conferring jurisdiction upon the Supreme Court of the United States to review the judgment of the court of appeals for the Ninth District of Ohio is 28 U.S.C. Section 1257(A).

THE CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const. *Amend. XIV.*

STATEMENT OF THE CASE

Respondent, Julie Herald, was born in 1959. The respondent alleged that from 1962 through 1974, she was sexually abused by her uncle, the petitioner, Dennis Hood. The respondent claims to have repressed memories of the alleged abuse until January, 1989. On December 29, 1989, the respondent filed an action sounding in battery and the intentional infliction of emotional distress with the Summit County, Ohio Court of Common Pleas.

Petitioner filed with the trial court a motion to dismiss, asserting that the action was without question barred by the statute of limitations and that the interests of justice demanded dismissal of the suit. (App., *infra*, pp. 6-13.) The trial court, however, denied petitioner's motion to dismiss and the matter proceeded through jury trial. (App., *infra*, p. 14.) Thereby, the court violated the petitioner's fundamental personal rights provided for by due process.

The petitioner immediately appealed the trial court's decision on the motion to dismiss, but the appeal was refused. (App., *infra*, p. 16.) The petitioner, after trial, again appealed this issue of law to the court of appeals for the Ninth District of Ohio. (App., *infra*, p. 32.) Said court refused to consider the issue, citing, in error, that the issue was not raised in the court below. (App., *infra*, p. 17.) The question was again raised in the petitioner's memorandum in support of jurisdiction and his brief on the merits before the Supreme Court of Ohio. (App., *infra*, p. 32.) The Supreme Court of Ohio, however, dismissed the appeal as having been improvidently allowed, and denied a rehearing of said order on November 2, 1994. (App., *infra*, p. 33-35.) The petitioner now offers this petition for a writ of certiorari to the United States Supreme Court.

ARGUMENT

A state may not withhold judicial process when to do so would constitute the deprivation of a fundamental constitutional right. See, for instance, *Boddie v. Connecticut*, 401 U.S. 371, 91, S.C.T. 780 28 LEd.2d 113 (1971). Thus, the petitioner submits a state may not provide access to the judicial process when to do so would constitute the deprivation of fundamental constitutional rights. Due process must protect a *defendant* from certain claims. This due process issue is an important question of federal law which has not been, and should be, settled by this court.

"[D]ue process of law signifies a right to be heard in one's defense." *Id.* 786, quoting from *Hovey v. Elliott*, 167 U.S. 409, 417 (1897). That right to be heard in one's defense, however, must be a meaningful opportunity. The petitioner submits, a lawsuit which raises vague allegations which allegedly ended 15 years prior to trial and allegedly began 30 years prior thereto, but were vaguely recalled only months before trial, and without corroborating evidence, denies the defendant a meaningful opportunity to defend himself, in violation of his constitutional right to due process of law. There are countervailing state interests of overriding significance making such suit repugnant to the concept of due process.

For instance, an unquestionably stale lawsuit which requires no evidence other than a claim of recent discovery denigrates our jury system. A jury's function is to properly weigh and evaluate the facts. If however such a suit is permitted, the jury is left with nothing but conjecture and innuendo. The jury is left to speculate, and this certainly is not the function of a jury.

Decades pass before a plaintiff raises the allegations of sexual abuse. Witnesses who knew the parties during the years in question may no longer be available. Witnesses who are available were unaware of

the alleged abuse during the years in question. Subtleties which could tend to prove or disprove the alleged events will long have faded from their memories.

In these cases, there is no lengthy paper trail of test results or other documents which do not fade with time, and in turn, support or deny the commission of a tort. Further, physical evidence to support or deny the commission of the alleged sexual abuse, which may have existed at the time of the alleged tort, is certainly no longer available.

Coupled with the lack of reliable witnesses and concrete evidence, a defendant is required to prove a negative. A defendant can only testify, as the petitioner did before the trial court, that he did not commit the alleged acts and that he certainly cannot account for every waking moment of his life decades ago. The respondent may raise the issue of what she considers to be an admission in this case. The purported admissions are nothing more than the petitioner's ill-fated attempts to help his deluded niece. This is not corroborating evidence. Meanwhile, a jury will certainly be sympathetic to the allegations of a young child being sexually abused.

More importantly, there is sharp disagreement amongst psychiatrists, psychologists and social workers regarding whether repressed memories are actually retrievable and whether said memories are reliable and accurate. The petitioner submits, our justice system should not allow, in the name of due process, judgments to be rendered and lives to be destroyed based upon what may be nothing more than a plaintiff's fantasy.

Furthermore, what is not fantasy, may be fraud. Cases alleging repressed memories of childhood sexual abuse are founded upon events which allegedly occurred decades ago; events which were witnessed by no one; memories which were allegedly repressed, but then, suddenly, allegedly remembered; and what the alleged

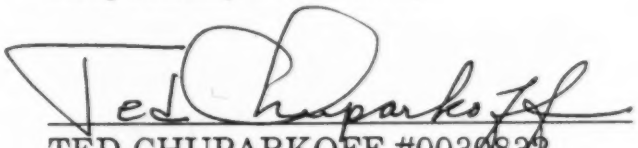
victim has told a psychiatrist, psychologist or social worker. These cases clearly invite fraud.

In conclusion, it is impossible for a defendant to defend against a suit like the case at bar. These actions are little more than "show trials" presided over by irresponsible tribunals and, thus, deprive a defendant of his property without due process of law. To allow such a trial violates due process, yet the trial court herein allowed such a trial and the court of appeals affirmed it.

CONCLUSION

Therefore, the petitioner respectfully requests that this court reverse and remand the court of appeals for the Ninth District of Ohio and the trial court, and conclude that childhood sexual abuse cases involving alleged repressed memories and no corroborating evidence violate a defendant's right to due process and right to be meaningfully heard in his own defense.

Respectfully submitted,



TED CHUPARKOFF #0030832
Attorney for Petitioner
The Evans Building, Suite 501
333 South Main Street
Akron, Ohio 44308
1-216-376-2156
FAX: 1-216-376-1475

APPENDIX

PETITIONER'S MOTION TO DISMISS EVIDENTIARY HEARING REQUESTED

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

(Filed August 10, 1990)

JULIE HERALD, ET AL,
Plaintiffs

vs.

DENNIS HOOD,
Defendant

CASE NO. CV89-12-4048

JUDGE CAMPBELL

Now comes the Defendant, DENNIS HOOD, by and through counsel, and respectfully moves this Court for an Order dismissing the Plaintiffs' complaint for the reason that the Statute of Limitations have run as to all claims set forth in Plaintiffs' amended complaint and Plaintiffs are, therefore, barred from bringing any such actions against the Defendant.

Respectfully submitted,

/s/WILLIAM R. MOORE, JR.,
Attorney for Defendant
P. O. Box 47
Tallmadge, Ohio 44278
(216) 633-8780

/s/TED CHUPARKOFF,
Attorney for Defendant
501 East Exchange Street
Akron, Ohio 44304
(216) 376-2156

MEMORANDUM

On or about May 30, 1990, the Plaintiffs filed their amended complaint, alleging the intentional infliction of emotional distress of the Plaintiff, Julie Herald, and loss of consortium by the Plaintiff, Jeffrey Herald, for acts of alleged sexual abuse of the Plaintiff, Julie Herald, alleged to have been committed by the Defendant between the years, 1962 to 1974.

The Defendant submits to the Court that the claims of the Plaintiffs for alleged wrongful acts occurring approximately sixteen (16) years ago are time-barred by the Statute of Limitations and, therefore, the Plaintiffs have failed to state a claim upon which relief can be granted.

Wherefore, the Defendant respectfully urges this Court to dismiss the Plaintiffs' action, for the reasons stated, with prejudice.

Defendant respectfully requests the Court to set this matter down for an evidentiary hearing.

/s/WILLIAM R. MOORE, JR.,
Attorney for Defendant

/s/TED CHUPARKOFF,
Attorney for Defendant

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

(Filed September 17, 1990)

JULIE HERALD, et al,
Plaintiffs

vs.

DENNIS HOOD,
Defendant

CASE NO. CV89-12-4048

JUDGE JOHN CAMPBELL

On December 29, 1989, Plaintiff, Julie Herald, instituted the instant case against the Defendant, Dennis Hood, alleging conduct by the Defendant which caused injury to the Plaintiff.

Pursuant to a Motion of the Defendant, this Court ordered the Plaintiffs to amend their complaint. Plaintiffs filed their amended complaint on or about May 30, 1990.

In summary, Plaintiff, Julie Herald, alleges abusive sexual conduct committed upon the person of the said Julie Herald, from the time she was approxi-mately age 3 years until she was approximately age 14 years (approximately 1962 to 1974) by the Defendant, which caused said Plaintiff to suffer psychological and physical injury. It is further alleged that the alleged conduct caused the said Julie Herald to develop "severe

psychological mechanisms" which included "denial, repression, and accommodation" and which "prevented" her from remembering the alleged conducts "as an adult" and caused her to be unable to assert her legal rights in court until January of 1989.

Plaintiff, Julie Herald, further alleges that, prior to January of 1989, she "did not know and could not discover" that she had been a victim at the hands of the Defendant, nor was she "competent to or capable of enforcing her legal rights" against the Defendant for her alleged injuries.

Plaintiff, Julie Herald's second claim for relief alleges intentional "non-consentual touching", causing injury, losses and damages described in her first claim for relief.

Plaintiff, Jeffrey Herald, alleges expenses for the care and treatment of his wife, Plaintiff, Julie Herald, as well as loss of services, society, companionship and consortium.

Defendant has filed a Motion to dismiss, asserting the bar of the statute of limitation and failure to state a claim upon which relief can be granted.

LAW AND ARGUMENT

The Plaintiff, Julie Herald, was 30 years of age at the time her original complaint was filed, on December 29, 1989, some 15 years after the alleged conduct ceased, and some 12 years after she attained the age of majority, as established by Section 3109.01, Ohio Revised Code, amended January 1, 1974. Plaintiff's assertion that she developed "severe psychological mechanisms" as a child which caused her to be unable to assert her legal rights in court until January, 1989, as well as her assertions that she "could not discover" that she had been a victim of the Defendant nor was she "competent to or capable of enforcing her legal rights" against the Defendant for her

alleged injuries, are apparently advanced as her reasons for her delay in bringing her claims until now, long after all statutes of limitation have run. Plaintiff, is, in essence, presenting to the court that she believes the circumstances set forth in her complaint acted to toll applicable statutes of limitation. Defendant, however, represents to the court that Plaintiff has failed to plead any matters in avoidance of the statute and, in the absence, her claim is barred. Section 2305.16, Ohio Revised Code. Defendant further submits that, if Plaintiff is saying she is or was incompetent, she has submitted nothing tending to establish that condition.

Regarding the alleged occurrences in Virginia, Defendant submits that it must be judged under the then existing Virginia law. Volume 2, Title 8.01-230 of the Code of Virginia, provides:

> "Accrual of cause of action.--In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person, when the breach of contract or duty occurs in the case of damage to property and not when the resulting damage is discovered, except where the relief sought is solely equitable or otherwise provided under Section 8.01-233, subsection C of 8.01-245, Sections 8.01-249, 8.01-250 or other statute."

and Title 8.01-243 provides, in part:

> "Personal action for injury to person or property generally.--A. Unless otherwise provided by statute, every action for personal injuries whatever the theory of recovery...shall be brought

> within two years next after the cause of action shall have accrued..."

It thus appears that Plaintiff's injuries would have been covered by the two year statute; that her claim accrued at the time of the injury and the limitation period began to run from the date of the injury. Thus, Defendant submits that Plaintiff has no claim under Virginia law and, therefor, no claim in Ohio for the alleged Virginia occurrences and the claim should be dismissed.

The action in question is one for damages for an assault and battery, and the limitation for bringing such an action at the time it is alleged to have occurred is governed by then section 2305.11, O.R.C., which provided, in part:

> "Time limitations for bringing certain actions.
>
> "An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued..."

The Defendant urges upon the Court, as Plaintiff did not bring her action within the statutory time of one year as provided by law, or within one year from the time she reached the age of majority, which at the time was 18 years, Section 3109.01, O.R.C., the Plaintiff is now barred from asserting her claim.

The Supreme Court of Ohio, in *O'Stricker vs. Jim Walter Corporation*, 84 O.S.3d, set out the rationale underlying statutes of limitations "is fourfold: to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases."

The essential characteristics of the Plaintiff's complaint are assault and battery. The Supreme Court of

Ohio, in *Love vs. City of Port Clinton*, 37 O.S.3d 98 (1988), has said:

> "Through clever pleading or by utilizing another theory of law, the assault and battery cannot be (transformed) into another type of action subject to a longer statute of limitations as it would circum-vent the statute of limitations for assault and battery to allow that to be done."

It appears to the Defendant justice in this case cries out for the imposition of the statute of limitation. Here we have a 30 year old woman claiming to have been molested by her uncle approximately 17 years ago, which she just now remembers.

Defendant recognizes that Ohio courts have adopted the discovery rule in bodily injury actions under Section 2305.10, O.R.C. However, we find no case extending the discovery rule to a case with the same or similar facts as the case at bar.

Defendant submits that the basis of Plaintiff's claim for the infliction of serious emotional distress upon her by Defendant could not have been maintained when the alleged events occurred for the reason that such a cause of action did not exist at that time. To permit the Plaintiff to maintain this action, at this time, when it could not have been maintained when it occurred, would be creating a new right in Plaintiff after the fact and would clearly be unjust and violate Defendant's right to due process.

Defendant urges that the Plaintiff's claim cannot be transformed into another type of action. Defendant further urges upon the Court that the discovery rule does not apply to a claim based upon a battery.

Respecting Plaintiff, Jeffrey Herald's claim for the medical expenses paid by him for his wife's care and the loss of services, society, companionship and consortium, it

is submitted that his claim is barred by Section 2305.09, O.R.C., which provides in part:

> "Four years; certain torts.
>
> "An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> "...(D) For an injury to the rights of the plaintiff not arising on contract nor enumberated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code..."

Defendant, therefore, urges this Court that the complaint of the Plaintiffs is barred by the statute of limitations and, therefore, fails to state a claim upon which relief can be granted and should be dismissed with prejudice.

Respectfully submitted,

s/WILLIAM R. MOORE, JR.,
Attorney for Defendant
P. O. Box 47
Tallmadge, Ohio 44278
(216) 633-8780

s/TED CHUPARKOFF,
Attorney for Defendant
501 East Exchange Street
Akron, Ohio 44304
(216) 376-2156

TRIAL COURT'S FINDING AND ORDER

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

(Filed September 19, 1990)

JULIE HERALD, et al
Plaintiffs

-vs-

DENNIS HOOD
Defendant

CASE NO. CV89 12 4048

JUDGE CAMPBELL

This case is before the Court on motions filed with the Court following the Plaintiffs' filing of their Amended Complaint. Each motion will be addressed separately in this order.

MOTION TO DISMISS

Defendant's Motion to Dismiss is denied. Defendant's motion for a dismissal based upon the reason that the statute of limitations has run is not well founded. The Court has reviewed Plaintiffs' memorandum and finds that Defendant's motion fails to meet the requirements of Ohio Civil Rule 12. The Court further finds that the statute of limitations did not commence to run until the Plaintiff discovered that the sexual abuse had occurred. See Ohio Revised Code 2305.10, *Oliver v. Kaiser Community Health Foundation* (1983, 5 Ohio St. 3d 111. The date of discovery question is a factual issued that must be determined by the trier of fact. The Court further adopts the other arguments of the Plaintiffs in their memorandum as a basis for this decision. The Court

finds that the request for an evidentiary hearing is denied.

MOTION TO STAY DISCOVERY, PROTECTIVE ORDER
MOTION TO STAY FILING OF ANSWER

Plaintiffs' Motion to stay answering Defendant's interrogatories until after the Defendant has filed his answer to the Amended Complaint is well taken and the Court grants the same.

Based upon the Court's ruling on Defendant's motion for dismissal, the Defendant is ordered to file his answer within 20 days from the date of the filing of this Order. Therefore the Defendant's Motion to Stay Answer is denied.

Plaintiffs are ordered to file their answers to Defendant's interrogatories pursuant to the time guidelines of the Ohio Civil Rules following the Defendant's answer.

Defendant is compelled to file his answers to the Plaintiffs' interrogatories and admissions 20 days after he has filed his answer to the Amended Complaint.

Plaintiffs' Motion to Compel Deposition is granted. Both parties' counsel are to agree upon a date to take all non-expert depositions within 90 days from the date of this Order.

The Defendant's protective motion from answering the Plaintiffs' Interrogatories Nos. 7, 8, 9, 10 and 11, or questions on a deposition as they pertain to the Defendant's financial status is granted.

PLEASE NOTE: A status call is set for December 4, 1990 at 8:30 a.m.

So ordered.

/s/ JOHN H. CAMPBELL
Judge

JOURNAL ENTRY OF THE COURT OF APPEALS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO

Case No. 14808

(Filed November 7, 1990)

JULIE HERALD, et al.
Plaintiffs-Appellees

v.

DENNIS HOOD
Defendant-Appellant

This cause was heard upon appellees' motion to dismiss this appeal for lack of a final appealable order pursuant to R.C. 2505.02. Appellant has filed a motion in opposition.

Upon consideration thereof, this Court finds that appellees' motion is well taken. The journal entry, dated September 19, 1990, from which this appeal is taken, denies appellant's motion to dismiss. A trial court's ruling denying a motion to dismiss on statute of limitation grounds is not a final appealable order within the meaning of R.C. 2505.02 and, therefore, is not immediately appealable. *State v. Torco Termite Pest Control* (1985), 27 Ohio App. 233.

Accordingly, appellee's motion is hereby granted and the appeal is dismissed.

/s/ JOSEPH E. CIRIGLIANO
Judge
/s/ JOHN W. REECE
Judge
/s/ D. B. QUILLIN
Judge

OPINION OF THE COURT OF APPEALS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY

Case No. 15986

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF SUMMIT, OHIO CASE NO. 89-12-4048

JULIE HERALD
Plaintiff-Appellee

v.

DENNIS HOOD
Defendant-Appellant

DECISION AND JOURNAL ENTRY

Dated: July 21, 1993

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, J. This cause comes before the court upon the appeal of Dennis Hood from the judgment entered in the Summit County Court of Common Pleas awarding Julie Herald compensatory and punitive damages in a civil action for battery and intentional infliction of emotional distress.

Julie Herald alleged that her uncle, Dennis Hood, sexually abused her for a twelve-year period beginning in 1962 and continuing though 1974. The abuse began when Julie Herald was three years old and Hood was sixteen; it

continued until Julie Herald was fifteen. She repressed memories of the abuse until January 1989. Julie Herald confronted Hood with the allegations and Hood apparently indicated in telephone conversations that she was "the only one" he had ever molested. Hood then met with Julie Herald at her therapist's office and, according to two witnesses, admitted he had sexually abused her. Hood denied Julie Herald's allegations.

Julie Herald filed a lawsuit in December 1989 charging Hood with battery and intentional infliction of emotional distress. After a two week trial, the jury returned a verdict in her favor. The jury awarded Julie Herald $150,000 in compensatory damages and $5,000,000 in punitive damages. The trial court reduced the punitive damage award to $2,500,000. Hood appeals and asserts fourteen assignments of error. To the extent that some of Hood's assigned errors raise the same issues, they will be discussed jointly.

Assignments of Error

> "I. The trial court's adoption of the discovery rule deprived the appellant of property and reputation without due process of law.
>
> "II. The trial court's adoption of the discovery rule was in error, prejudiced the appellant and created an improper and dangerous rule of law in the State of Ohio, which cannot be sustained by this court."

Hood argues that he was unconstitutionally deprived of due process of law and that the trial court misapplied the discovery rule when it found that Julie Herald's cause of action did not accrue until she recalled the sexual abuse, long after the statute of limitations for either battery or intentional infliction of emotional distress had run. The record, however, indicates that Hood did not raise the unconstitutional deprivation issue in the trial court. Errors which arise during the course of

the proceedings and are not brought to the attention of the trial court at the time they could be remedied, are waived and may not be reviewed on appeal. *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 123. Hood's first assigned error is not well taken.

Hood also contends that the trial court created a dangerous rule of law in Ohio when it applied the discovery rule to an adult survivor of childhood sexual abuse. Nevertheless, this court has already applied the discovery rule in a sexual abuse case similar to this one. *Ault v. Jasko* (Feb. 24, 1993), Lorain App. No. 5344, unreported. In *Ault*, we traced the Supreme Court of Ohio's application of the discovery rule in a number of contexts, from medical malpractice (*Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111) to legal malpractice (*Skidmore & Hall v. Rottman* (1983), 5 Ohio St.3d 210) to asbestos exposure (*O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84). *Id.* at 3. In applying the discovery rule, courts may have to sacrifice prompt prosecution of claims so as not to bar a legitimate cause of action before a plaintiff knows the injury exists. *Id.* at 4.

In the case at bar, Julie Herald repressed memories of the childhood sexual abuse and did not "know" or discover the acts or the identity of the perpetrator until after the statute of limitations expired. In the situation where the victim of childhood sexual abuse represses memories of the abuse until a later time, this court applies the discovery rule to toll the statute of limitations. "The statute of limitations begins to run from the time the victim is able to recall (*i.e.* discover) that she was sexually abused, or, through the exercise of reasonable diligence, the time the victim should have discovered the sexual abuse." *Id.* at 8.

In this case, the statute of limitations was tolled, by statute, until Julie Herald reached the age of majority. Then, application of the discovery rule operated to toll the

statute of limitations until she was able to recall that she had been sexually abused, which was January 2, 1989, according to her complaint. In view of our application of the discovery rule, Hood's second assigned error is not well taken. We overrule Hood's first and second assignments of error.

Assignment of Error III

> "The trial court's denial of the appellant's motion to bifurcate was an abuse of discretion and prejudiced the appellant."

Civ.R. 42(B) allows a separate trial of various issues "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition [or] economy ***." The matter of ordering separate trials of different issues within a case rests in the sound discretion of the trial court. *Heidbreder v. Northampton Township Trustees* (1979), 64 Ohio App.2d 95.

Hood argues for two trials, one to decide whether Julie Herald's cause is barred by the applicable statute of limitations and a second to decide the merits of her claim. Since her claim is that her repression of any memory of the abusive acts was caused by the grievous nature and extent of those acts, the extent and nature of the acts would be the key issue of both trials. Bifurcation would not enhance judicial expedition or economy because the same expert testimony would need to be repeated in a second trial if Julie Herald's claim survived the statute of limitations barrier. Hood's argument that a single trial prejudiced him is also without merit. Under either scenario, a jury considering the merits would hear the identical expert testimony. There is no evidence that the trial court abused its discretion in refusing to bifurcate the trial. We overrule Hood's third assignment of error.

Assignments of Error

"IV. The trial court erred in denying the appellant's motion for a new trial on the grounds of excessive damages appearing to have been given under the influence of passion and prejudice.

"XII. The trial court erred in denying the appellant's motion for a new trial on the grounds that the verdict was against the manifest weight of the evidence."

Hood asserts that he should have a new trial because 1) the jury's punitive damage award was so high, it must have been the result of passion and prejudice; and 2) the jury's verdict was against the manifest weight of the evidence. We disagree.

A trial court possesses broad discretion in deciding whether to order a new trial based on excessive damages, and its decision will not be reversed unless it abused its discretion. *Knor v. Parking Co. of Am.* (1991), 73 Ohio App.3d 177, 187 (citation omitted). See, also, *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, paragraph one of the syllabus.

In determining whether passion and prejudice influenced a jury verdict, the reviewing court considers: 1) the amount of damages awarded; 2) whether incompetent evidence induced the award; 3) any misconduct by the trial court or counsel; and 4) any other action which might have swayed the jury when they determined the amount. *Greenwood v. Alcan Aluminum Corp.* (April 18, 1990), Lorain App. No. 4598, unreported, at 11-12, citing *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, 568-569. The defendnt must demonstrate that passion and prejudice influenced the jury's decision. *Knor* at 188. In this case, Hood's sole argument is that the amount of damages is so excessive, it must have been the result of passion and prejudice. He makes no reference to any of the other factors to be considered and fails to prove passion and prejudice from the record. A

large disparity between compensatory damages and punitive damages is not, of itself, cause to reverse the judgment or to grant a re-mittitur. *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 40. However, if a verdict appears excessive, but does not appear to be influenced by passion or prejudice, the trial court may "reduce the verdict by remittitur to any amount warranted by the evidence." *Greenwood* at 11, citing *Chester Park Co. v. Schulte* (1929), 120 Ohio St. 273, paragraph three of the syllabus. Hood's fourth assignment of error is not well taken.

Hood then contends that he should be granted a new trial because the verdict was against the manifest weight of the evidence. In his brief, Hood charges that Julie Herald "alleged an unbelievable story, yet the jury rendered a verdict in her favor. Therefore, the verdict is against the manifest weight of the evidence."

In considering the claim that a judgment is against the manifest weight of the evidence,

> "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court,***."

C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, paragraph one of the syllabus. The record indicates that the verdict for Julie Herald is supported by competent, credible evidence. Julie Herald's testimony that she had been sexually abused was supported by the opinion testimony of two expert witnesses. Furthermore, Hood admitted to the abuse and apologized to Julie Herald in front of the two witnesses. The record also contained evidence of telephone conversations in which Hood assured Julie Herald that he never molested any other children and that she was "the only one."

Hood charges that the telephone conversations were misconstrued and that he only admitted abuse in

front of the witnesses because he thought it would help in Julie Herald's therapy. Nonetheless, when there are inconsistencies in the testimony, it is up to the jury to weigh the evidence and assess the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

Because competent, credible evidence supports the jury's verdict, Hood's twelfth assignment of error is not well taken. We overrule Hood's fourth and twelfth assignments of error.

Assignments of Error

> "V. Trial court's failure to consider the affidavit of juror, James Province, was contrary to law and prejudiced the appellant.
>
> "VI. Rule 606(B) of the Ohio Rules of Evidence is unconstitutional and its applicability to the appellant's post trial motions denied the appellant his constitutional rights to a fair trial and an impartial jury."

Ordinarily, after a verdict has been rendered, a juror may not testify about events which occurred during deliberations. Evid.R. 606(B). The prohibition includes testimony as to any matter directly pertaining to the emotional or mental processes of the jury's deliberations. *Id.* Furthermore, where a juror's testimony would be inadmissible, his affidavit is likewise inadmissible. *Id.*

Hood charges that the trial court should have considered the juror's affidavit rather than finding that it was prohibited by Evid.R. 606(B), which is, in any case, unconstitutional. The affidavit in question alleged that the jurors failed to follow the trial court's instructions as to the order in which to consider the issues. The affidavit did not allege any "external influence" or "outside source," but rather, addressed procedures occurring during the

jury's deliberations. Hood's fifth assignment of error is not well taken.

As to Hood's claim that Evid.R. 606(B) is unconstitutional, the record indicates that he did not raise the constitutionality issued to the trial court. A reviewing court will not consider issues which appellant failed to raise in the trial court. *LeFort v. Century 21 Maitland Realty Co., supra.* We overrule Hood's fifth and sixth assignments of error.

Assignment of Error VII

"The trial court committed prejudicial error by permitting discovery which was beyond the scope of discovery."

Hood asserts that the trial court should have suppressed a portion of the testimony of his own expert witness, Dr. Michael Smith because opposing counsel's knowledge of Dr. Smith's opinion was gained through improper discovery. The record indicates, however, that Hood was the first to ask the expert the identical question, that is, whether Julie Herald was molested by "somebody" when she was a child. Furthermore, when Julie Herald later asked the expert the question on cross-examination, Hood did not object. As previously discussed, Hood thereby waived his right to raise the issue on appeal. *Id.* We overrule Hood's seventh assignment of error.

Assignment of Error VIII

"The trial court committed error by permitting a jury instruction on the intentional infliction of emotional distress."

Hood charges that there should not have been a jury instruction on intentional infliction of emotional distress, because that tort did not exist when Julie Herald was being sexually molested by her uncle. The tort was recognized by the Supreme Court of Ohio in *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369. Both parties

agree that common law decisions are retrospective in operation and "erase" prior decisions to the contrary. See *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210. Hood, however, would qualify the general rule by having the "new" law apply retroactively only to cases which are pending when the new law is announced. Hood offered no case law to support his contention. We overrule his eighth assigned error.

Assignment of Error IX

"The trial court committed preju-dicial error by refusing to submit appellant's proposed jury interrogatories."

Civ.R. 49(B) provides, in pertinent part, that "[t]he court shall submit written interrogatories to the jury *** upon request of any party prior to the commencement of argument." Hood contends that the trial court refused to submit his interrogatories. The record, however, is much less clear.

The record contains two reference to the interrogatories. In the first, Hood's attorney is addressing the trial court, as follows:

"MR. CHUPARKOFF: Yes. I think my -- let me see that, Judge, please. I think that was -- let me see that. No, I'm sorry, that was not intended to be that. I think we are now pre-paring an interrogatory. We may have one or two there, and I apologize for that.

"THE COURT: Now, here are some interrogatories, I see. Who were they prepared by?

You don't have to take this down."

(Discussion off the record.)

The second reference to the interrogatories occurred later the same day, as follows:

"MR. CHUPARKOFF: *** And just for the record, too, the Judge -- Court has rejected my interrogatories and my instructions, and of course for the record, I --

"THE COURT: I didn't reject your instructions. If you go back and read what I said you will find -- you will find a lot of your instructions in there.

"MR. CHUPARKOFF: I meant my interrogatories. I beg your pardon, interrogatories. For the record, my interrogatories were rejected.

"THE COURT: Well, after a short break, see if you can find that."

(Recess had.)

The record indicates no evidence that the trial court affirmatively acted to "reject" Hood's interrogatories. Furthermore, after being instructed to find any such a rejection in the record, Hood failed to report back to the court on the results of his investigation or to raise the subject of interrogatories again in the trial court.

Although there is apparently no question that Hood proposed interrogatories, all pertinent discussion with regard to them is off the record. Julie Herald argues that during the initial side bar conference, Hood withdrew the original interrogatories in order to draft another set. She further states that Hood did not draft a second set and did not resubmit the original interrogatories. Hood raised no objection when the jury began deliberations without interrogatories.

Julie Herald also contends that even had the proposed interrogatories been properly presented to the trial court, it could have properly rejected them as incomplete, ambiguous or otherwise legally objection-able. *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, paragraph three of the syllabus. Review of the proposed interrogatories indicates that the first four are ambiguous and confusing because they do not specify the legally pertinent time frame. See *Otte v. Dayton Power & Light Co.* (1988), 37 Ohio St.3d 33, 41. In this case, Julie Herald's suit can survive a defense based on the statute of limitations only if she did not "discover" the abuse and the perpetrator sometime within a legally specific time frame; she could have no conscious awareness of the injury from the time of her eighteenth birthday until one year prior to the time the suit was filed. The four interrogatories do not delineate the pertinent time frame. The fifth interrogatory addresses the precise issue submitted to the jury for its verdict and is unnecessary. *Ramage* at 108 (citation omitted).

Hood neither demonstrated the trial court's rejection of his interrogatories nor drafted interrogatories with a legally pertinent time frame. We overrule his ninth assignment of error.

Assignments of Error

"X. The trial court abused its discretion and prejudiced the appellant when it permitted appellee's witness, Victoria

> Kepler-Didato, to give an expert opinion regarding whether or not the appellee suffered from the psychological phenomenon of repression.
>
> "XI. The trial court abused its discretion and prejudiced the appellant when it permitted expert opinion testimony embracing the ultimate issue to be decided by the jury.
>
> "XIII. The trial court committed prejudicial error when it refused the appellant access to the records of appellee's counselor, Victoria Kepler-Didato.
>
> "XIV. If the group counseling records made by Victoria Kepler-Didato are privileged, the trial court committed prejudicial error when it permitted Kepler-Didato to testify at trial."

Hood's final four assignments of error concern the testimony and records of expert witness, Victoria Kepler-Didato, and, to a lesser degree, Dr. Robert DeVies. Hood first objects to Ms. Kepler-Didato's testimony regarding the existence of the psychological phenomenon of "repression." He objects because she is not a licensed psychologist but made a psychological diagnosis. The competency of an expert witness is a matter to be determined by the trial court and its ruling will not be reversed absent a showing of an abuse of discretion. *Leichtamer v. American Motors Corp.* (1981), 67 Ohio St.2d 456, 473. The record indicates that Ms. Kepler-Didato is a licensed professional counselor with extensive experience in the field of sex abuse counseling, in which the concept of repression occurs with some frequency. Furthermore, she worked under the supervision of a licensed psychologist and diagnosed the phenomenon in

that capacity. See R.C. 4757.01(A). Hood's tenth assignment of error is not well taken.

Hood then charges that Ms. Kepler-Didato and Dr. Robert DeVies impermissibly testified that, in their opinion, Julie Herald had been sexually abused as a child. Evid.R. 702 provides, in pertinent part, that "*** a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Evid.R. 704 elaborates on opinion testimony, as follows:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

The record indicates that Ms. Kepler-Didato and Dr. DeVies were qualified by their professional education and experience to evaluate Julie Herald's physical and emotional responses and to testify that she was the victim of childhood sexual abuse. Furthermore, Hood's own expert witness, after extensive interviewing and clinical testing of Julie Herald testified that his findings were consistent with those of Ms. Kepler-Didato and Dr. DeVies. The trial court did not abuse its discretion in admitting the experts' testimony to assist the jury in understanding the evidence or in determining a fact in issue. Evid.R. 702. Hood's eleventh assignment of error is not well taken.

Hood's remaining assignments of error concern testimony and records associated with group counseling sessions attended by Julie Herald and led by Ms. Kepler-Didato. Hood maintains that he should have obtained access to the records, despite Ms. Kepler-Didato's objection that they contained the confidential and privileged communications of the other participants in the group sessions. The trial court recognized the records of the counseling sessions as privileged, pursuant to R.C.

2317.02. Then it ordered Ms. Kepler-Didato to provide redacted copies with the clients' names concealed. After an in camera inspection, the trial court ordered Ms. Kepler-Didato to limit her testimony to information obtained as a result of individual sessions with Julie Herald. Ms. Kepler-Didato was not permitted to testify as to any information obtained as a result of the group sessions. If during cross-examination a question arose as to the source of her testimony, Hood's attorney was able to inspect the redacted copies. The trial court enjoys considerable discretion in the regulation of discovery proceedings. *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 668. There is no evidence that the trial court abused its discretion. As to barring Ms. Kepler-Didato's testimony because she would have obtained knowledge in the privileged group therapy sessions, the Supreme Court of Ohio has recognized that an expert witness is capable of disregarding information obtained in a privileged situation and testifying only on the basis of non-privileged facts and information. *Moore v. Grandview Hospital* (1986), 25 Ohio St.3d 194, syllabus. Hood's thirteenth and fourteenth assignments of error are not well taken.

We overrule Hood's tenth, eleventh, thirteenth and fourteenth assignments of error and affirm the judgment of the trial court.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at

which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ WILLIAM R. BAIRD
FOR THE COURT

COOK, P.J.
DICKINSON, J.
CONCUR

PETITIONER'S PROPOSITIONS OF LAW BEFORE THE SUPREME COURT OF OHIO

WHEN A TRIAL COURT, WITHOUT AUTHORITY FROM A COURT OF SUPERIOR JURISDICTION, ABANDONS THE GENERAL RULE THAT TORT ACTIONS ACCRUE WHEN THE WRONGFUL ACT IS COMMITTED, THAT TRIAL COURT EXCEEDS ITS AUTHORITY AND DEPRIVES A DEFENDANT OF PROPERTY AND REPUTATION WITHOUT DUE PROCESS OF LAW.

IN CIVIL CASES ALLEGING REPRESSED MEMORIES OF CHILDHOOD SEXUAL ABUSE, THE DISCOVERY RULE IS INAPPLICABLE UNLESS THERE IS OBJECTIVE, VERIFIABLE PROOF OF THE ALLEGATIONS.

PETITIONER'S ASSIGNMENTS OF ERROR BEFORE THE NINTH DISTRICT COURT OF APPEALS, SUMMIT COUNTY, OHIO

THE TRIAL COURT'S ADOPTION OF THE DISCOVERY RULE DEPRIVED THE APPELLANT OF PROPERTY AND REPUTATION WITHOUT DUE PROCESS OF LAW.

THE TRIAL COURT'S ADOPTION OF THE DISCOVERY RULE WAS IN ERROR, PREJUDICED THE APPELLANT AND CREATED AN IMPROPER AND DANGEROUS RULE OF LAW IN THE STATE OF OHIO, WHICH CANNOT BE SUSTAINED BY THIS COURT.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Case No. 93-1864)

1994 TERM

(Filed September 28, 1994)

JULIE HERALD,
Appellee,

v.

DENNIS HOOD,
Appellant.

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Summit County, was considered in the manner prescribed by law. On consideration thereof, this cause is dismissed, *sua sponte*, as having been improvidently allowed, based upon the Court's decision in *Ault v. Jasko* (1994), 70 Ohio St.3d 114, 637 N.E.2d 870, wherein the Court applied the discovery rule for purposes of tolling the statute of limitations in child-sexual-abuse-repressed-memory cases, consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant her costs herein expended; and that a mandate be sent to the Court of Common Pleas for Summit County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

COSTS:

Docket Fee, $40.00, paid by Ted Chuparkoff, Inc.

Printing of Record, $106.21, paid by Ted Chuparkoff, Inc.

(Summit County Court of Appeals; No. 15986)

/s/ THOMAS J. MOYER
Chief Justice

RECONSIDERATION ENTRY OF THE SUPREME COURT OF OHIO

(Case No. 93-1864)

1994 TERM

(Filed November 2, 1994)

THE SUPREME COURT OF OHIO

JULIE HERALD,
Appellee,

v.

DENNIS HOOD,
Appellant.

(SUMMIT COUNTY)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and the same is hereby, denied.

(Court of Appeals No. 15986)

/s/ THOMAS J. MOYER
Chief Justice